89-487

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE REPUBLIC OF GHANA, THE GHANA SUPPLY COMMISSION, and THE BANK OF GHANA,

Petitioners,

— against —

TREFALCON CORPORATION, SIDNEY H. REICH, as Trustee of the estate of Trefalcon Corporation, Bankrupt,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MICHAEL S. COLE
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32 pp

Questions Presented

1. Should an interlocutory appeal have been granted to the defendant West African Republic, following denial of the petitioner's motion to dismiss the complaint against it in the bankruptcy court, on grounds of the bar of the statute of limitations.

2. Should the bar of the statute of limitations apply where the defendant government's witnesses once available are now no longer available, the unavailability of the witnesses occurred following a coup d'etat, which took place during the twelve year period of the plaintiff's delay in bringing the underlying breach of contract action.

3. Has the bankruptcy court exceeded its authority in applying the Bankruptcy Code Section 11 (e) in derogation of the state statute of limitations applicable to breach of contract, where the cause of action arose before the filing in bankruptcy.

PARTIES TO THE PROCEEDING

The parties before this Court are the same as those identified in the caption of this petition.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Statutes:

OPINIONS BELOW

The Order of the Court of Appeals denying a writ of mandamus dated, June 12, 1989 (A)* is unpublished. The Opinion of the District Court denying certification of an interlocutory (B)*, is also unpublished. The Opinion of the Bankruptcy Court denying the petitioners-defendant's motion to dismiss (C)*, is also unpublished.

JURISDICTION

The jurisdiction of this court is conferred by 28 U.S.C. 1254 (1).

*Letter references are to sections of the appendix.

STATEMENT OF THE CASE

(1)

This case presents the Court with the issue of the limits of the discretion of the lower courts in denying an interlocutory appeal, where the bankruptcy court has applied the Bankruptcy Code in derogation of the state statute of limitations which will result in an otherwise futile trial, causing not merely legal prejudice, but possibly irreparable political harm to a foreign government friendly to the United States.

(2)

The plaintiff-debtor's alleged cause of action for breach of contract, arose 12 years before the commencement of the adversary proceeding in the bankruptcy court, and one year before the filing in bankruptcy. The bankruptcy court denied the defendants' motion to dismiss the complaint on the grounds of the application of the New York State six year statute of limitations applicable to breach of contract. *The District Court denied certification of the issue for an interlocutory appeal. The Second Circuit Court of Appeals denied a writ of mandamus by the petitioner defendants, upon which a writ of certiorari is sought from this Court.*

(3)

Whereas Bankruptcy Act Section 11 (e) now 11 U.S.C. 108 (a), permits the savings of certain actions for the Bankruptcy Trustee for a "two year" period from the date of "adjudication", it was never intended that this period be stretched by "conversion" to a second bankruptcy proceeding to *eleven years*. A strained interpretation of the Bankruptcy Code, combined with the refusal to exercise discretion to permit an interlocutory appeal, has operated to subject a foreign government and its agencies, to the trial of an otherwise barred claim. A proper defense is no longer possible due to the extended period of time that has passed, and the events that have transpired in the interim.

(4)

As per the complaint in this adversary proceeding, the breach of contract causes of action arose in 1975, and the complaint was not served until 1987, twelve years later. New York Civil Practice Law and Rules, Section 213 (2), gives a plaintiff "six years" in which to commence an action for breach of contract. The New York State Court of Appeals, the court of last resort in New York, has held, that the six year period of limitations begins to run at the time of the breach. See, *Kassner & Co. v. City of New York*, (New York Court of Appeals 1979), 46 N.Y. 2d. 544, 550, 415 N.Y.S. 2d. 785.

In 1981, the defendant petitioner Republic of Ghana underwent a change of government by coup d'etat. Beginning from the date of the coup to the present, most of the prior officials of government and necessary witnesses to the defense of this action have left the country and cannot be located. There is no better set of facts to which the New York statute of limitations should reasonably apply.

REASONS FOR GRANTING THE WRIT

(1)

The basis for an interlocutory appeal is set out in 28 USC 1292 (b):

> "(i) a controlling question of law is involved,
> (ii) the question is one where there is a substantial ground for difference of opinion, and
> (iii) an immediate appeal would materially advance the ultimate termination of the litigation"

Clearly, a determination that an action is barred by the statute of limitations, will "materially advance the ultimate termination of the litigation". That there is a controlling question of law involved here is plainly evident, since the applicability of the statute of limitations where the facts of the breach are

not in dispute is purely a question of the application of law. There is no dispute here as to the "time of breach" because the defendants rely upon the cause of action as pled in the complaint. See Appendix D. Since this is a case of first impression on these facts, there cannot logically be a difference of opinion on this issue.

In, *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 545-547, 69 S.Ct. 1221, 1225-26, (1949) this court held that certain orders were immediately appealable if: (1) if they were collateral to the merits; (2) if denial of an immediate appeal would result in "irreparable damage" to the party seeking review; and (3) if the issue raised is "too important" to "be deferred until the whole case is adjudicated."

The instant case involves the collateral legal issue of applicability of the state's statute of limitations. The unnecessary irreparable harm in this case, will arise from a trial in the Bankruptcy Court requiring defense witnesses who fled Ghana after the change in government and who are now naturally hostile to the defendants, this trial will necessarily cause serious political harm to the new government of Ghana. If the statute of limitations issue should be determined in the defendants' favor, then a trial of this action would be futile, and the harm caused would have been completely unnecessary and unjust. Consequently, the issue is too important to be deferred until the whole case is adjudicated.

(2)

Bankruptcy Act Section 11 (e) provides the trustee in bankruptcy an additional "two years" from the date of the "adjudication" in bankruptcy in which to commence an action in behalf of the debtor's estate. Section 1 (12), 11 U.S.C., states that "adjudication" means the "date of filing" of the petition which operates as an "adjudication". But a rule of reason dictates, that the interpretation of these sections cannot mean that an "adjudication" will not occur for purposes of the running of the "two year" savings provision of 11 (e), for a period nine years from the original filing in bankruptcy. That is, in this case, the cause of action as pled in the complaint, arose in 1975, the

original Chapter 11 Petition was filed in 1976, it was converted to a Chapter 7 Proceeding in 1985, and this adversary proceeding was not commenced until 1987. The nine year period being, the period between the date of the original filing in bankruptcy in this case, which was 1976, and the date of the conversion to a Chapter 7 Proceeding in 1985. The bankruptcy court below held that the two year period under 11 (e) did not begin to run until the "adjudication" in Chapter 7, which occurred in 1985. Thus, the commencement of the action in 1987, was held to be timely by the bankruptcy court below.

The lead cases cited by the bankruptcy court in its decision below, denying defendants' motion to dismiss the complaint due to the statute of limitations are: *In the Matter of Ira Haupt & Co.*, 390 F.2d 251 (2nd Cir. 1968); *In re Patio Springs Inc.*, 6 B.R. 428, (D.Utah 1980). See Appendix C.

Both the *Haupt* and *Patio* cases are cited for the proposition that the two year period given to the trustee runs from the date of "adjudication", but neither of these cases deals with the situation, such as in this case, where the trustee has not sought "adjudication" for nine years.

Unless the law has lost its "rule of reason", the "adjudication" for purposes of Bankruptcy Act 11 (e), cannot be 1985, or nine years from the date of the original filing in bankruptcy. To interpret Section 11 (e) this way, would give rise to absurd perversions in the application of the statute of limitations and the Bankruptcy Code, which could extend an otherwise stale claim for as long as the proceeding remains on the docket due to lack of action by the trustee, without full "adjudication", or until the time of *"conversion"*, rather than *"adjudication"*, which could be 18 years as easily as 9 years as in this case.

The Second Circuit in *Austrian v. Williams*, 198 F 2d. 697 (1952), held in an action in the Bankruptcy Court for breach of a fiduciary duty arising under State law, that the cause of action was barred by the applicable New York Statute of Limitations applicable. Although the cause of action there was held expired before the filing of the petition, the Court squarely

addressed the issue of the applicability and interpretation of the state limitations period vis a vis Section 11 (e) of the Bankruptcy Act.

The Court in *Austrian* held that the state statute of limitations is to be applied in a Bankruptcy case in the same manner as if it were a normal diversity case in the Federal Court. The *Austrian* case expressly states, that it is the intent of Section 11 (e) of the Bankruptcy Act, to incorporate the scheme of the state statute of limitations:

> "*The fact that diversity jurisdiction is lacking does not alone preclude a result similar to that which would be reached if there were such jurisdiction.* Though it may be true that the rationale of *Guaranty Trust Co. v. New York*, supra, and *Erie R.Co. v. Tompkins*, 304 U.S.64, is inapplicable where a federal statute or federal interest is involved, *D'Oench, Duhme & Co v. FDIC*, 315 U.S. 447; *Clearfield Trust Co v. U.S.*, 318 U.S. 363, *there may be other reasons to support, or require, the same result. Here there is such another reason provided by Section 11, sub. e of the Bankruptcy Act*. . . ."
>
> ". . .When New York enacted Section 53 of the Civil Practice Act it did not merely prescribe a ten year period within which a suit must be brought to avoid being barred; it enacted a comprehensive statutory scheme to further what it thought to be a worthwhile legislative objective, and what the detail of this scheme were are what the New York courts have decided they are. *We hold that this statutory scheme as interpreted by the New York Courts is incorporated in Section 11, sub. e of the Bankruptcy Act and it is this composite which federal courts are directed to apply*"
>
> *Austrian v. Williams*, 198 F2d. at 700-701. (Emphasis added)

In the case at bar, the cause of action accrued under State law at the time of breach, which was one year prior to the filing in bankruptcy.

In *United States v. Hardeman*, 260 F.Supp. 723, the (M.D. Fla. 1966) District Court held that where the cause of action accrued during the Bankruptcy action, as opposed to "prior" to the filing of the petition for arrangement, there was no bar. The Court distinguished between those cases where the cause of action accrued "after the filing" from those cases where it accrued "before the date of filing." Accordingly, the court in *Hardeman* stated:

> "The cases cited by defendants are distinguishable from the instant case because in those cases the action being sued upon accrued *prior* to the filing of the petition for arrangement. Further, commencing the running of the two years of Section 11 (e) from the date of filing the petition for arrangement preserved actions which otherwise would have been expired at the date of adjudication of bankruptcy. See, *Schneidmiller v. Egsterom*, 177 F.2d. 196 (9th Cir. 1949); *Dabney v. Levy*, 191 F2d. 201 (2nd Cir 1951); *Harmon v. Willbern*, 227 F.Supp. 892.
>
> *United States v. Hardeman*, supra, 260 F.Supp. at 727. (Emphasis in the Original)

The cause of action in this case arose before the filing in bankruptcy, in 1975. Thus, the complaint in this action should not have been served after 1983. The New York State statute of limitations provides six years from the time of the breach in which to bring a breach of contract action; Section 11 (e) of the Bankruptcy Act provides an additional two years, giving eight years from the time of breach, or until 1983. The commencement of this action in 1987, twelve years after the breach, was therefore in violation of the New York State statute of limitations and Section 11 (e) of the Bankruptcy Act.

CONCLUSION

The interlocutory appeal from the denial of the defendants' motion to dismiss the complaint should have been granted.

For the foregoing reasons, this petition should be granted and a writ of certiorari should issue to review the order of the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
September 5, 1989

Respectfully submitted,

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Of Counsel:
MICHAEL S. COLE

APPENDIX

APPENDIX A

United States Court of Appeals

FOR THE

SECOND CIRCUIT

In Re:

THE REPUBLIC OF GHANA, THE GHANA SUPPLY COMMISSION, and THE BANK OF GHANA,	SDNY 89-CIV-571 CONBOY
Petitioners	Docket Number: 89-3022

A petition for writ of mandamus and/or prohibition having been filed,

Upon consideration thereof, it is DENIED.

Dated:

_____

_____

_____

APPENDIX B

UNITED STATES DISTRICT COURT 89 Civ. 571 (KC)
SOUTHERN DISTRICT OF NEW YORK
----------X

In the Matter of

TREFALCON CORPORATION,

BANKRUPTCY FILE NUMBER 76 B 2990 CB

Bankrupt.

----------X

SIDNEY H. REICH, as Trustee of the estate of Trefalcon Corporation, Bankrupt,

Plaintiff,

—against—

ADVERSARY PROCEEDING SUBDOCKET "C"

THE REPUBLIC OF GHANA, THE GHANA SUPPLY COMMISSION, and THE BANK OF GHANA,

Defendants.

----------X

AFFIRMATION IN OPPOSITION TO

MOTION FOR LEAVE TO APPEAL

I, JOHN W. FINLEY, JR., attorney for SIDNEY H. REICH, Trustee of the estate of Trefalcon Corportion, do, under the penalties for perjury, hereby affirm that the following is true and correct:

MEMORANDUM ENDORSEMENT

In re Trefalcon 89 Civ. 571 (KC)

Kenneth Conboy, District Judge

The few cases that have addressed the question indicate that the premature filing of a bankruptcy appeal is timely. *See In re Mike*, 796 F.2d 382 (11th Cir. 1986); *In re Brickyard*, 735 F.2d 1154 (9th Cir. 1984); *Nicoladze v. Lawler*, 86 B.R. 69 (N.D. Tex. 1988). Nonetheless, the Court declines to grant leave to appeal Judge Blackshear's order. An immediate appeal would be proper if defendants demonstrated:

> (i) that a controlling question of law is involved, (ii) that the question is one in which there is a substantial ground for difference of opinion, and (iii) that an immediate appeal would materially advance the ultimate termination of the litigation.

Elliot Assocs. v. LTV Corp., 71 B.R. 251, 252 (S.D.N.Y. 1986) (citing *In re Johns-Manville Corp.*, 39 B.R. 234, 236 (S.D.N.Y. 1984)). Defendants acknowledge this burden but do not satisfy it. Merely asserting, without any analysis or supporting authority, that the trustee's action is untimely is not sufficient to establish that "there is a substantial ground" to differ with Judge Blackshear's ruling. The enumerated difficulties in defending this action, which are collateral to the single legal issue raised on this application, do not, standing alone justify an interlocutory appeal. *See Cohoes Industrial Terminal, Inc. v. Latham Sparrowbrush Assocs.*, 75 B.R. 147, 148 (S.D.N.Y. 1987).

SO ORDERED
Dated: New York, New York
April 26, 1989

U.S.D.J.

APPENDIX C

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

In the Matter of

TREFALCON CORPORATION, 76 B 2290 CB
Bankrupt.

----------x

SIDNEY H. REICH, as Trustee of the estate of Trefalcon Corporation, Bankrupt,

Plaintiff,

— against —

THE REPUBLIC OF GHANA, THE GHANA SUPPLY COMMISSION, and THE BANK OF GHANA,

Defendants.

----------x

OPINION AND DECISION DENYING MOTION FOR SUMMARY JUDGMENT

B E F O R E :

HONORABLE CORNELIUS BLACKSHEAR,
United States Bankruptcy Judge

APPEARANCES:

CASCONE & COLE
Attorneys for Defendants
711 Third Avenue
New York, New York 10017

BY: MICHAEL S. COLE, Esq., Of Counsel

JOHN W. FINLEY, JR.
Attorney for Trustee
168 Grand Street
White Plains, New York 10601

In the instant proceeding, the defendants, The Republic of Ghana, Ghana Supply Commission and the Bank of Ghana, make a motion for summary judgment alleging that plaintiff's cause of action for breach of contract is time barred by the applicable New York six year statute of limitation. *See* New York C.P.L.R. § 213(b).

Facts

In 1975, the defendants breached a contract which they had entered into with Trefalcon Corporation ("debtor"). Subsequently, in 1976, the debtor filed a voluntary petition in bankruptcy seeking the protection afforded under Chapter XI of the Bankruptcy Act of 1898 (the "Act"). On April 17, 1985, the case was converted to a liquidation pursuant to Chapter VII of the Code. A trustee was appointed, but was subsequently removed by a creditors' motion. Sidney Reich ("plaintiff" or "Trustee") was then appointed trustee on April 14, 1987, and commenced the instant proceeding on April 16, 1987.

Defendants assert that plaintiff's action for breach of contract is time-barred by the applicable New York six year statute of limitations because the cause of action accrued more than twelve years prior to plaintiff's instant suit.

Plaintiff contends that he is not constrained from bringing the instant action by New York's six year statute of limitations. Plaintiff asserts that Bankruptcy Act § 11e[1], former Code § 29e, saved to the Trustee, for two years from Trefalcon's adjudication, all actions not time-barred at the time of commencement of the Chapter XI proceeding in October, 1976.

Discussion

1. Since § 11e gives the Trustee two years subsequent to the adjudication to bring suit on behalf of the bankrupt estate, the date of adjudication must be determined.

The date of adjudication in bankruptcy for Trefalcon Corporation was April 17, 1985. On this date the case was converted

from a Chapter XI (where it had been pending for 9 years) to a liquidation/straight bankruptcy pursuant to Chapter VII.

Although the filing of a petition in bankruptcy may be considered the "date of adjudication," it is only an adjudication if it *acts* as an adjudication. *See* former 11 U.S.C. § 1(12).[2]

In *In re Ira Haupt & Co.*, 390 F.2d 251 (2d Cir. 1968), *cert. denied*, 391 U.S. 916 (1968), the Court of Appeals held that the two year extension given to the Trustee under Act § 11e began to run when the debtor was *actually* adjudicated bankrupt, *not* when the original petition in Chapter XI was filed. (emphasis added).

In *Ira Haupt*, bankruptcy was commenced by the filing of an involuntary petition in Chapter XI against Haupt. Shortly thereafter, Haupt filed a voluntary petition under Chapter XI. Subsequently, the debtor was adjudged bankrupt. 390 F.2d at 252-53. The court held that the controlling date for purposes of §11e was the date the debtor was adjudicated bankrupt, not the date of petition. 390 F.2d at 254.

Similarly, *In re Patio Springs, Inc.*, 6 B.R. 428 (D. Utah 1980) held that "the 'date of adjudication' is the actual date of adjudication and does not relate back to when the Chapter XI proceeding was filed" for purposes of applying §11e. 6 B.R. at 430; *accord Costello v. Pan American World Airways, Inc.*, 295 F. Supp. 1384 (S.D.N.Y. 1969).

Therefore, the plaintiff/trustee in the case at bar properly brought the instant suit on April 16, 1987 which was within two years of the April 17, 1985 adjudication.

2. It must now be determined whether the plaintiff's suit is barred by New York State's six year statute of limitations relating to contract claims. *See* New York C.P.L.R. § 213(b).

First, Act § 11e allows a trustee to bring "any claim against which the period of limitation fixed by Federal or State law *had not expired at the time of the filing of the petition in bankruptcy*

(emphasis added). The plain language of this section clearly gives the trustee a suit which is not time-barred against the defendant. The cause of action accrued and, hence, the six year statute of limitations began to run in 1975. Therefore, at the time the Chapter XI petition was filed in 1976, only a year and a half had run on the statute of limitations. Section 11e expressly provides for extensions of time when the relevant statute of limitation has not expired at the time of filing the petition. *See* 1A Collier on Bankruptcy (14th ed.) ¶11.13 [2].

Act § 11e further states that the trustee may bring the action, which had not expired before the petition was filed, within a set period (here, the two year period) subsequent to the date of adjudication. Again, the language is supportive of the trustee's suit. It appears that § 11e acts to extend any limitations that have not run at the time of filing to the applicable period subsequent to the adjudication.

The fact that the original petition was filed as a Chapter XI and the adjudication was in Chapter VII presents no problems for the previous discussion. Bankruptcy Rule 122 supports the timeliness of the trustee's suit. Rule 122 declares that all Chapter XI cases continued as bankruptcy cases ". . . shall be conducted as far as possible as if no petition commencing a chapter [XI] case had been filed." This means that upon debtor's conversion to Chapter VII, the Chapter VII will be deemed to have commenced at the filing of the original petition (the Chapter XI petition), i.e., as if it had been a Chapter VII proceeding all along. *See In re V. Pangori & Sons, Inc.*, 53 B.R. 711 (E.D. Mich. 1985). The intention of Rule 122 was, insofar was possible, to give the trustee the rights he would have if the Chapter VII was filed on the date of the original Chapter XI filing. *See id.* at 721. Rule 122 requires that the trustee be given those rights upon conversion/adjudication.

3. Further, the trustee only acquired the right to commence suit on behalf of the debtor's estate on April 17, 1985. Thus, it would be patently unfair if the cause of action became time-barred before the trustee was even able to pursue the claim. This

would act to hurt the creditors for whom Chapter VII is designed to help. Chapter VII is meant to enhance the creditors' prospects for recovery and the trustee is appointed to further this goal by pressing recovery of estate claims. Thus, the trustee should not be estopped from commencing the instant proceeding because of an apparent lack of diligence on the part of the debtor in possession. The trustee and his duties are clearly distinguishable from those of the debtor. Moreover, that Congress intended to preserve estate claims to the trustee is clear from the extensions of time provided under the Act. This is to provide the trustee with a fresh attempt to realize, for the benefit of creditors, the claims formerly of the debtor.

Conclusion

It is the determination of this Court that the plaintiff/trustee in the instant action properly brought suit against the defendants herein. The cause of action was in existence when the petition was filed and the trustee brought suit within the two year extension period provided by §11e subsequent to the adjudication in bankruptcy on April 17, 1985. Thus, the defendant's motion for summary judgment is denied.

Settle order consistent with this opinion.

Dated: New York, New York
December 7, 1988

United States Bankruptcy Judge

Footnotes

1. Bankruptcy Act § 11e

> A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy. Where, by any agreement, a period of limitation is fixed for instituting a suit or proceeding upon any claim, or for presenting or filing any claim, proof of claim, proof of loss, demand, notice, or the like, or where in any proceeding, judicial or otherwise, a period of limitation is fixed, either in such proceeding or by applicable Federal or State law, for taking any action, filing any claim or pleading, or doing any act, and where in any such case such period had not expired at the date of the filing of the petition in bankruptcy, the receiver or trustee of the bankrupt may, for the benefit of the estate, take any such action or do any such act, required of or permitted to the bankrupt, within a period of sixty days subsequent to the date of adjudication or within such further period as may be permitted by the agreement or in the proceeding or by applicable Federal or State law as the case may be.

2. 11 U.S.C. § 1(12)

> "Date of Adjudication" is defined in Section 1(12), 11 U.S.C. § 1(12), as follows:
>
> "Date of adjudication" shall mean the date of the filing of any petition which operates as an adjudication or the date of entry of a decree of adjudication, or if such decree is appealed from, then the date when such decree is finally confirmed or the appeal is dismissed.

APPENDIX D

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

---x

In the Matter of

TREFALCON CORPORATION, 76 B 2990 CB

Bankrupt.

---x

SIDNEY H. REICH, as Trustee of the estate of Trefalcon Corporation, Bankrupt, ADVERSARY PROCEEDING

Plaintiff,

SUBDOCKET "C"

—against—

THE REPUBLIC OF GHANA, THE GHANA SUPPLY COMMISSION, and THE BANK OF GHANA, COMPLAINT

Defendants.

---x

Plaintiff, SIDNEY H.REICH, as Trustee in Bankruptcy of the Estate of Trefalcon Corporation, for his Complaint against the Defendants, THE REPUBLIC OF GHANA, THE GHANA SUPPLY COMMISSION, and THE BANK OF GHANA, by his attorney, JOHN W. FINLEY, JR., upon information and belief alleges:

NATURE OF THE ACTION

1. This action arises out of a commercial dispute and is brought by the Trustee in Bankruptcy to recover an Estate asset by collection of monies owed to Trefalcon Corporation, upon causes of action rooted in a contract with and breached by Defendant, The Ghana Supply Commission, a commercial arm of the Republic of Ghana, and upon a contract with and breached by Defendant, the Bank of Ghana, for the benefit of Trefalcon Corporation. Damages are also sought for injuries suffered by Trefalcon Corporation as a consequence of the tortious acts of the Defendants. Defendant, The Republic of Ghana, is a foreign state amenable to the jurisdiction and process of the Courts of the United States, by reason of the commercial activities of the Defendants, The Ghana Supply Commission and The Bank of Ghana, on its behalf, as are the latter two Defendants.

THE PARTIES

2. Plaintiff, SIDNEY H. REICH, is the duly qualified Trustee of the Estate of Trefalcon Corporation, resident in the State and Southern District of New York, appointed by Order of April 14, 1987 in proceedings in the United States Bankruptcy Court for the Southern District of New York under case number 76 B 2990 CB, and as the Estate's representative is the lawful successor in interest to the claims and causes of action of Trefalcon Corporation, including those extant as of October 20, 1976.

3. TREFALCON CORPORATION ("Trefalcon") is a Maryland Corporation whose principal place of business and corporate headquarters at all times relevant have been maintained in the City, County and State of New York. On October 20, 1976, Trefalcon filed for protection in the United States Bankruptcy Court for the District of Maryland under Chapter XI of the Bankruptcy Act, former Title 11, United States Code, and was a debtor in possession thereafter until conversion of that proceeding to one under Chapter VII on April 17, 1985. Subsequently, on July 25, 1986, the proceeding in Bankruptcy was transferred to the District Court for the Southern District of New York,

and by Order dated November 20, 1986 was transferred to the Bankruptcy Court for the Southern District of New York.

4. Defendant, THE REPUBLIC OF GHANA (herein "Ghana"), is a nation located on the west coast of Africa and a "foreign state" within the meaning used in Chapter 97 of Title 28, United States Code.

5. Defendant, GHANA SUPPLY COMMISSION (herein "GSC"), as a commercial agency, instrumentality, and delegate of Defendant GHANA in commercial matters, is an "agency or instrumentality of a foreign state" as that term is used in Chapter 97 of Title 28, United States Code, and at all times relevant was engaged in "commercial activities" as that term is used in Chapter 97 of Title 28, United States Code, including but not limited to those activities with which this action is concerned.

6. Defendant, THE BANK OF GHANA (herein "BANK"), as a commercial agency, instrumentality, delegate of Defendant GHANA in commercial matters, and that nation's central bank, is an "agency or instrumentality of a foreign state" as that term is used in Chapter 97 of Title 28, United States Code, and at all times relevant was engaged in "commercial activities" as that term is used in Chapter 97 of Title 28, United States Code, including but not limited to those activities with which this action is concerned.

JURISDICTION AND VENUE

7. Jurisdiction of this Court, a unit of the United States District Court for the Southern District of New York, is founded on 28 United States Code §§ 1330 and 1334, in that (a) this is an action against a foreign state and agencies or instrumentalities of a foreign state which are subject to the jurisdiction of this Court under provisions of § 1605 of Title 28, United States Code, and (b) this case is one related to a case under Title 11, United States Code.

8. Venue exists in this District by virtue of 28 United States Code §§ 1409 and 1391 (f) (1).

ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

9. On or about March 18, 1974, Trefalcon and GSC entered into an agreement in writing of which Exhibit "1" annexed hereto is a true copy (hereinafter the "Agreement").

10. The Agreement by its terms provided, *inter alia*, that for a period of "two (2) years certain" from the date of March 1, 1974, Trefalcon was to be the exclusive carrier to "lift (transport) all supplies of crude oil from any source indicated to the Corporation (Trefalcon) by the (Ghana Supply) Commission to the port of Tema and also to lift finished products from the port of Tema to the port of Takoradi." See Article 1(a).

11. The Agreement by its terms provided, *inter alia*, that GSC was to supply its "lifting programme to the Corporation for a period of one year at a time." See Article 1(d).

12. The Agreement by its terms provided, *inter alia*, that "such lifting programme may be revised from time to time." See Article 1(d).

13. The Agreement by its terms provided, *inter alia*, that "The Commission shall pay the Corporation freight rates as per Schedule III attached." See Article 1(f).

14. The Agreement by its terms provided, *inter alia*, that "The Commission shall supply bunkers at competitive prices to fuel the tankers provided by the Corporation." See Article 1(g).

15. The Agreement by its terms provided, *inter alia*, that "The Commission shall supply the Corporation residual fuel where the reserves of the Commission permit at competitive prices." See Article 1(h).

16. The Agreement by its terms provided, *inter alia*, that "The Commission shall reimburse the Corporation all port, harbour and other expenses contained in the conditions for lifting crude oil applicable at the port of loading and port of discharge as per schedule 1(a) 1(b) and II attached which the Corporation is called upon to pay to the port authorities." See Article 1(i).

17. The Agreement by its terms provided, *inter alia*, that "The Commission shall insure the crude oil and refined products owned by the Commission from the port of loading to the port of discharge." See Article 1(h).

18. The Agreement by its terms provided, *inter alia*, that The Commission would pay to the Corporation all expenses Trefalcon reasonably incurred or which were necessarily incidental to the hiring of tankers during a delay where Trefalcon was not at fault and the supplier of petroleum to GSC refused for any reason whatsoever to load the tanker(s). See Article 2(d).

19. The Agreement by its terms provided, *inter alia*, that The Commission would pay to the Corporation all expenses Trefalcon reasonably incurred or which were necessarily incidental to the hiring of tankers "during a delay or non-utilisation of the tankers" where Trefalcon was not at fault and had placed tankers at the Commission's disposal in compliance with and during the period of a GSC lifting programme. See Article 2(d).

20. The Agreement by its terms provided, *inter alia*, that "Payment from one party to the other party shall be by irrevocable letter of credit unless otherwise mutually agreed upon." See Article 3(a).

21. The Agreement by its terms provided, *inter alia*, that "Either party may give the othere party one year's notice of its intention to terminate this contract." See Article 3(b).

22. The Agreement by its terms provided, *inter alia*, that "No party to this contract shall, without the previous consent in writing of the other party, assign to third parties the contract or any rights or obligations thereunder." See Article 3(c).

23. The Agreement by its terms provided, *inter alia*, that "If any difference or dispute arises between the parties concerning the interpretation or performance of this contract anything herein contained or in connection therewith, or the rights and liabilities of either of the parties, and if the parties fail to settle such difference or dispute by agreement, the same shall be settled by arbitration." See Article 3(c).

24. The Agreement by its terms provided, *inter alia*, that any notice to be given by one party to the other party to the Agreement was to be in writing and delivered by hand, prepaid registered post, or by telegraph or cable, to addresses for each set forth in the Agreement. See Article 3(f).

25. In compliance with the Agreement, Trefalcon timely commenced and continued its performance in accordance with the terms thereof and in compliance with such lifting schedules as were provided it by the GSC.

26. GSC made a written offer on May 3, 1974 (herein the "May 3rd offer") to sell to Trefalcon GSC's high- and low- sulfur residual fuel oil at stated prices set forth therein, in furtherance of Article 1 (h) of the Agreement. A true copy is annexed as Exhibit "2".

27. In conformity with the May 3rd offer, Trefalcon on May 3, 1974 tendered to GSC its written acceptance (herein the "May 3rd acceptance") of the May 3rd offer. A true copy is annexed as Exhibit "3".

28. Pursuant to Article 1 (h) of the Agreement and the May 3rd offer and acceptance, GSC sold and Trefalcon purchased, respectively, between March 1, 1974 and May 26, 1975, numerous tanker vessel loads of residual fuel oil (herein "RFO").

29. At no time did GSC initiate or even seek, or notify Trefalcon of a request of GSC for, or of an intention of GSC to seek, arbitration of any dispute or difference concerning the Agreement with Trefalcon.

30. At no time prior to May 26, 1975, did GSC give notice to Trefalcon of an intent to terminate the Agreement.

31. At no time did Trefalcon initiate arbitration of a dispute or difference with GSC, or give notice to GSC of an intention to terminate the Agreement.

AS AND FOR A FIRST CAUSE OF ACTION AGAINST DEFENDANTS REPUBLIC OF GHANA AND GHANA SUPPLY COMMISSION

32. Plaintiff repeats and realleges, as if here fully set forth, all of the foregoing matters.

33. GSC, refusing to abide by the Agreement, unilaterally repudiated and abruptly terminated the Agreement in connection with the sale of RFO to Trefalcon on or about May 26, 1975, thereafter refused to deal with Trefalcon in connection with RFO, and stated, in a writing transmitted to Trefalcon, its refusal to continue, which writing was signed by the Managing Director of GSC, Mr. J. V. L. Mensa. A true copy is annexed as Exhibit "4".

34. The unilatereal termination by GSC of the Agreement was wrongful, intentional, without legal justification or excuse, and in direct conflict with the obligation undertaken by GSC in the Agreement to proceed by arbitration as its exclusive remedy for resolution of all differences and disputes not settled by agreement, relating to the interpretation or performance under the Agreement or the rights and liabilities of the parties.

35. In the period following the May 26, 1975 repudiation by GSC of the Agreement and through the end of the Agreement's term, Trefalcon, but for the unlawful termination of the Agreement by GSC, had a reasonable expectation of a net profit to be realized by Trefalcon in purchasing and reselling RFO in the sum of and would have realized a net profit therefrom of four million, eighty-nine thousand one hundred two ($4,089,102.05) and 05/100 dollars.

36. By reason of GSC's wilfull and wrongful termination of the Agreement and refusal to sell RFO to Trefalcon, Trefalcon was damaged in the sum of four million, eighty-nine thousand one hundred two ($4,089,102.05) and 05/100 dollars, which sum was invoiced by Trefalcon to but never paid by GSC, and with lawful interest thereon remains owed to Plaintiff by the Defendants GHANA and GSC. A true copy of the invoice is annexed as Exhibit "5".

No. 89-487

In The

Supreme Court of the United States

October Term, 1989

THE REPUBLIC OF GHANA, THE GHANA SUPPLY COMMISSION, and THE BANK OF GHANA,

Petitioners,

- against -

SIDNEY H. REICH, as Trustee of the estate of Trefalcon Corporation, Bankrupt,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

JOHN W. FINLEY, JR.
Attorney for Respondent

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White Plains, New York 10601
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OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the petition for certiorari invoking jurisdiction under 28 U.S.C. § 1254(1) meets the review standard of the Court under its Rule 17.

2. If jurisdiction be exercised by the Court, whether the Circuit panel committed reversible error in denying to Petitioners a writ of mandamus for the purpose(s) set forth by Petitioners, quoted in Appendix B hereof.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

RESPONDENTS STATEMENT OF THE CASE

By voluntary petition filed October 20, 1976 in the District of Maryland, Trefalcon Corporation ("Trefalcon") sought protection under Chapter XI of the Bankruptcy Act of 1898 (the "Act").[1] Subsequently, Trefalcon was adjudicated a Bankrupt on April 17, 1985 and that same day Respondent's predecessor was appointed trustee.

A motion was thereafter made on behalf of aggrieved creditors to secure transfer of the Bankruptcy case to New York's Southern District. Following a hearing the District Court at Baltimore ordered the requested transfer on July 25, 1986.[2]

Subsequently, a motion was made by creditors for the removal of the Maryland trustee. On March 27, 1987, the relief sought was stipulated and by Order entered thereon, Respondent was appointed and duly qualified as

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[1] This case was commenced under the National Bankruptcy Act (Act of July 1, 1898, c. 541), 30 Stat. 544, codified as the former Title 11, United States Code, as amended. The Bankruptcy Code (P.L. 95-598, Title I, § 101 et seq., of November 6, 1978), codified as the present Title 11, United States Code (hereinafter the "Code"), as amended, while repealing the Act saved to cases commenced under the Act the applicability of the Act: § 403(a) of Public Law 95-598, 92 Stat. 2683.

[2] The Maryland District Court under the Act was a Court of Bankruptcy; Act § 1(10). That Court was, under the Act, enabled to " . . . transfer cases to other Courts of Bankruptcy." Act, § 2a(19). After receipt of the files from Maryland, the District Court for the Southern District Of New York (Lowe, D.J.) ordered on November 20, 1986, the transfer of the entire case to the Bankruptcy Court for the Southern District of New York (Blackshear, B.J.).

successor trustee on April 14, 1987. Two days later, on April 16, 1987, this adversary proceeding was commenced by the Respondent as plaintiff to recover indebtedness and damages owed the estate of Trefalcon Corporation. Pursuant to the terms of the Foreign Sovereign Immunities Act,[3] all Defendants were served as therein provided.

By Answer[4] to the Trustee's Complaint, the Defendants asserted various affirmative defenses and moved for summary judgment under B.R. 7056, asserting, alternatively, that (a) this proceeding could not be maintained because of a time-bar, and (b) the Southern District of New York was an inconvenient forum for the Defendants. At oral argument the latter ground was abandoned and by Order entered on the December 7, 1988 Opinion and Decision of the Bankruptcy Court, the motion was denied.

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[3] Act of October 21, 1976, 90 Stat. 2891, Chapter 97, Title 28, U.S. Code, § 1602 et seq., as amended ("FSIA").

[4] Their Answer, dated December 3, 1987, has not been reproduced by petitioners. However, it denied the character of the parties, jurisdiction, and venue; it admitted that the Ghana Supply Commission ("GSC") with Trefalcon had on or about March 18, 1974 entered into the Agreement (concerning the transportation of crude oil and refinery products, the sale of fuel oil to Trefalcon, and other matters) annexed as Exhibit "1" to the Complaint, and that it was a true copy of the original. The Answer denied the essential terms of the Agreement, denied a written offer and a written acceptance made by those parties concerning the sale of residual fuel oil, and denied further that copies thereof annexed as exhibits "2" and "3" to

(Continued on following page)

Petitioners served and filed their notice of appeal from the Decision, prior to the entry of the Order on December 20, 1988. The Trustee served his motion to dismiss the appeal on February 10, 1989. Petitioners then moved for leave to appeal, after filing a brief on the merits. The District Court's Memorandum Endorsement of April 26, 1989, which denied leave to appeal, followed. It is reproduced in the Appendix to the Petition (at A-2, A-3) as Appendix B.

Petitioners in May, 1989 next sought a Writ of Mandamus from the Court of Appeals for the Second Circuit. A panel of the Court of Appeals denied a writ on June 12, 1989. See Petitioners' Appendix "A," at A-1.[5]

Petitioners now seek a Writ of Certiorari directed to the Second Circuit, putting in issue that decision of the panel.

(Continued from previous page)

the Complaint were true. Of the first 36 paragraphs of the Complaint, reproduced in Petitioners' Appendix as "D" at A-11 through A-17, only paragraph 9 was admitted. Respondent has reproduced the balance of his Complaint, consisting of 29 paragraphs and five additional causes of action, as an Appendix "A" to this Brief. None of those allegations has been admitted.

[5] Precisely what was sought in the Circuit by Petitioners was less than clear, as may be seen from their prayer for relief, reproduced as Respondent's Appendix "B." The petition in the Circuit appeared to request that the Circuit certify a question to the District. The Petitioners' statement of the case, however, now asserts [page 1 at (2)] that "[t]he District Court denied certification of the issue for an interlocutory appeal," though no application for such relief was made as distinguished from their motion in the District Court for leave to appeal.

REASONS FOR DENYING THE WRIT

Summary

The Petition omits awareness of Rule 17.1 of the Court. It does not reflect an abuse of discretion, by the Circuit panel in denying a writ of mandamus, which merits the intervention of the Court. To the contrary the Circuit, on the same grounds Petitioners here advance, failed to find that there was a question of law as to which there was a need for instruction by this court under 28 U.S.C. § 1254(3). Nor do Petitioners demonstrate an abuse of discretion by the District Court in denying an interlocutory appeal from the Order of the Bankruptcy Court. Instead, Petitioners have invoked unfounded claims of prejudice which are *dehors* the record and consist only of conjecture. Finally, but not least among the reasons justifying denial of the petition is the fact that the arguments advanced by Petitioners cannot and will not affect any other case nor lead to a needed clarification of the law for prospective application.

(I)

The Rules of this Court enjoin prospective petitioners to heed Rule 17. In pertinent part it provides:

> "Rule 17. Considerations governing review on certiorari
>
> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter, or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.
>
> . . . "

The Petition offers no explanation of the way in which Petitioners would contend that they present a question which merits the supervision or intervention of the Court.

"Special and important reasons" suggests the prospect of correction of some egregious wrong overlooked in the Bankruptcy and District Courts. In the former, Petitioners were afforded ample opportunity to substantiate how they would be unfairly burdened by the Trustee's case. They availed of the opportunity to argue the law and the facts, and came up short.

On the other hand, Petitioners initiated and continued through 1980 an oppressive, costly, and groundless

action in the District of Massachusetts as set forth in the Respondent Trustee's Complaint paragraph 63.

(II)

The Bankruptcy Court Opinion addressed the merits of the Petitioners' motion as argued to the Court. Reproduced in the Petition, it discloses no egregious error. Instead, it precisely illustrated a careful awareness of Congressional intent concerning balancing competing wants and needs of creditors and the Petitioners. That the Bankruptcy Code might prove more fortuitous for Petitioners is of no moment: as noted, note 1 above, Congress saw fit for the Act to apply in the specifics of this case. It would be an egregious wrong for the Act **not** to apply, in light of the Trustee's Statement of the Case, supra, and the allegations of his Complaint which Petitioners chose to omit. See Respondent's Appendix A.

(III)

The District Court, in functioning as an appellate court, recognized the substantial flaw in that appeal as a failure to demonstrate "' . . . a substantial ground' to differ with Judge Blackshear's ruling." Petitioners' Appendix B, at A-3.

(IV)

As night follows day, the Court of Appeals, as the third court to be involved, found no ground for an extraordinary writ, let alone a need for certifying a question under 28 U.S.C. § 1254(3).

(V)

The Trustee's action was not brought without careful analysis. It is a serious action that the Complaint reflects. Petitioners understandably seek to escape a heavy burden which the Trustee's action portends. Respondent Trustee at this point respectfully urges that Petitioners have had more than ample opportunity to supply the courts below with any meritorious arguments, and were found wanting. The action should now proceed.

Allowance of the writ would have no significance as precedent since the provisions of the Bankruptcy Act below at issue were altered so that the issue below cannot arise under the Bankruptcy Code. Thus the prospect of a similar, subsequent case is astronomically small.

CONCLUSION

The Petition for a writ of certiorari to the U.S. Court of Appeals for the Second Circuit should be denied.

Dated: White Plains, New York
October 28, 1989

Respectfully submitted,

JOHN W. FINLEY, JR.
Attorney for Plaintiff
Sidney H. Reich, Trustee

175 Main Street
White Plains, New York 10601
(914) 761-8442

APPENDIX "A"

COMPLAINT (Para. 37 – end)

AS AND FOR A SECOND CAUSE OF ACTION AGAINST ALL DEFENDANTS

37. Plaintiff repeats and realleges, as if here fully set forth, all of the foregoing matters.

38. Pursuant to and in conformity with the Agreement's terms, Trefalcon arranged for and provided vessels for the carriage of GSC's cargoes of crude petroleum and refined oil products.

39. Pursuant to the Agreement, GSC caused a letter of credit to be issued by Defendant BANK OF GHANA to the favor of Trefalcon, no. MAN/800/74/85, in the amount of five million ($5,000,000.00) dollars, which was lodged at and confirmed by Manufacturers Hanover Trust Company at 350 Park Avenue, New York, New York, to Trefalcon. A true copy thereof is annexed as Exhibit "6".

40. Though by its terms the letter of credit had expired on September 30, 1974, the Defendants caused Manufacturers Hanover Trust Company at 350 Park Avenue, New York, New York, to continue to honor the drafts of and make repeated payments to Trefalcon for its services into 1975.

41. In February, 1975, a replacement letter of credit, identical in form except drawn in the amount of four million ($4,000,000.00) dollars, to expire December 31, 1975, and designated no. MAN 800/75/7 was lodged at

and confirmed by Manufacturers Hanover Trust Company at 350 Park Avenue, New York, New York, to Trefalcon. A true copy thereof is annexed as Exhibit "7".

42. Though Trefalcon was performing in compliance with the Agreement, and GSC was heavily indebted to Trefalcon at the time, GSC abruptly terminated on July 8, 1975 that aspect of the Agreement by which Trefalcon transported GSC's cargoes.

43. In furtherance of GSC's unlawful termination of the Agreement, GSC advised or instructed BANK at that time that the Agreement was not in effect and that no further payments were to be made to Trefalcon.

44. Upon the advice of GSC, BANK issued instructions to Manufacturers Hanover Trust Company in New York not to make any further payments to Trefalcon.

45. At no time did GSC initiate or even seek, or notify Trefalcon of a request of GSC for, or of an intention of GSC to seek, arbitration of any dispute or difference concerning the Agreement with Trefalcon or that aspect of it dealing with Trefalcon's carriage of GSC's cargoes.

46. At no time prior to July 8, 1975, did GSC give notice to Trefalcon of an intent to terminate the Agreement.

47. The unilateral termination by GSC of the Agreement was wrongful, intentional, without legal justification or excuse, and in direct conflict with the obligation undertaken by GSC in the Agreement to seek arbitration as its exclusive remedy for resolution of all differences and disputes not settled by agreement, relating to the

interpretation or performance under the Agreement or the rights and liabilities of the parties.

48. By reason of GSC's willful and wrongful termination of the Agreement, and GSC's and BANK's wrongful termination of the letter of credit, Trefalcon sustained damage relating to the transport of GSC's cargoes in the amount of five million, two hundred seventy-nine thousand five hundred seventy-four ($5,279,574.46) and 46/100 dollars, which sum was due in 1975 and demanded by Trefalcon of GSC but never paid, and with lawful interest thereon remains owed to Plaintiff by the Defendants.

AS AND FOR A THIRD CAUSE OF ACTION AGAINST ALL DEFENDANTS

49. Plaintiff repeats and realleges, as if here fully set forth, all of the foregoing matters.

50. The actions of the Defendants GSC and BANK, in repudiating the Agreement, the May 3rd offer and acceptance, and the undertakings expressed and implied in the letters of credit and course of dealing established between and among Trefalcon and the Defendants, render them jointly and severally liable for the consequential damages of Trefalcon produced by the cessation of payments to Trefalcon and the continuing obligations which Trefalcon was required to meet.

51. As a direct consequence of the actions of the Defendants, Trefalcon lost all revenues, was unable to continue operations, was obliged to discharge its employees, surrender its offices, and was unable to retain advantageous contract and other rights, including Trefalcon's rights under a mining concession in Greece with

proven ore reserves worth in excess of twenty-six million ($26,000,000.00) dollars.

52. Upon information and belief Trefalcon's consequential damage suffered as a consequence of the Defendants' acts is a sum in excess of and not less than twenty-six million ($26,000,000.00) dollars, plus interest accrued thereon from July of 1975.

AS AND FOR A FOURTH CAUSE OF ACTION AGAINST DEFENDANTS REPUBLIC OF GHANA AND GHANA SUPPLY COMMISSION

53. Plaintiff repeats and realleges, as if here fully set forth, all of the foregoing matters.

54. The Defendants GHANA and GSC are indebted for all sums claimed under the First Cause of Action, which if not paid result in the unjust enrichment of those Defendants brought about by the wilfull misconduct of GSC.

AS AND FOR A FIFTH CAUSE OF ACTION AGAINST ALL DEFENDANTS

55. Plaintiff repeats and realleges, as if here fully set forth, all of the foregoing matters.

56. All Defendants are indebted for all sums claimed under the Second Cause of Action, which if not paid result in the unjust enrichment of the Defendants brought about by the wilfull misconduct of GSC and BANK.

AS AND FOR A SIXTH CAUSE OF ACTION AGAINST DEFENDANTS REPUBLIC OF GHANA AND GHANA SUPPLY COMMISSION

57. Plaintiff repeats and realleges, as if here fully set forth, all of the foregoing matters.

58. Defendant GSC intentionally repudiated the Agreement with Trefalcon in order to procure for various persons within the hierarchy of the GSC as it was then composed, unlawful financial consideration in the form of payments to be received from the entity succeeding to Trefalcon's contractual rights to purchase RFO from GSC under the Agreement.

59. The intentional repudiation of Trefalcon's Agreement by GSC was, upon information and belief, the unlawful aim, purpose, and intent of a conspiracy between and among GSC and a Connecticut corporation to which GSC thereafter sold its RFO, INCONTRADE CORPORATION ("Incontrade").

60. In furtherance of the unlawful scheme to abrogate the Agreement with Trefalcon, GSC commenced a series of escalating demands in early 1975 which continued until GSC's repudiation, seeking prices higher than agreed upon for RFO it was obliged to sell to Trefalcon.

61. Notwithstanding Trefalcon's payment of the agreed base price for cargoes of RFO, and Trefalcon's protests that amounts invoiced by GSC in excess thereof were incorrect and had to be recalculated in accordance with the Agreement and May 3rd offer and acceptance, GSC purposefully, and with knowledge of the terms of the Agreement which it had dictated to Trefalcon, and the terms of the May 3rd offer and acceptance, did not seek to reach an agreement of settlement as required by the Agreement, did not proceed to arbitration over its alleged

difference with Trefalcon as the sole remedy provided by the Agreement, but chose instead to declare the Agreement terminated, refused to provide proper lifting schedules, falsely informed Trefalcon by means of wire and mails that its reimbursements of expenses to which Trefalcon was contractually entitled would be paid if the documents sent by Trefalcon to GSC at Accra were instead presented to Manufacturer's Hanover Trust Company for payment in New York City, at which bank GSC had previously opened successive irrevocable letters of credit to Trefalcon's credit and referable to the Agreement, when in fact GSC had concealed from Trefalcon its knowledge that it had already instructed said bank not to pay and had with said bank's cooperation cancelled the previously irrevocable letter of credit.

62. In furtherance of its unlawful scheme to abrogate the Agreement with Trefalcon and forever ruin the good name and reputation of Trefalcon, to deny it any fair chance at minimal due process of law in Ghana, and upon information and belief to cover and conceal the scheme upon which it had embarked, GSC thereafter commenced, authorized, aided and abetted, and participated in a series of unfounded complaints, "tips," and "leaks," to representatives of its own government and that of the United States, subjecting Trefalcon and certain of its representatives to baseless criminal investigations and unfounded intimations of misconduct, further burdening Trefalcon and its principals unnecessarily with the need to respond to such inquiries in order to be exonerated.

63. In furtherance of its unlawful scheme aforesaid, GSC waived, and GHANA waived as well, any defense of

sovereign immunity in the Courts of the United States with respect to subject matter jurisdiction of the Agreement and of this action, by commencing a groundless lawsuit in the United States District Court for the District of Massachusetts against the ultimate purchaser from Trefalcon of the various cargoes of RFO, claiming, *inter alia*, that the defendant in that action, NEW ENGLAND POWER COMPANY (herein "NEPA"), owed GSC more than twenty-six million ($26,000,000.00) dollars because Trefalcon had stolen the RFO cargoes and NEPA thus could not take title to the cargoes from Trefalcon. As a consequence of that action, NEPA impleaded its purchasing agent, INCONTRADE, which in turn impleaded Trefalcon though INCONTRADE knew that Trefalcon had already filed for Chapter XI relief in the District of Maryland. GSC thereafter abandoned any pretense of the merit of its action and it was dismissed by Order of the District Court on March 10, 1980, following GSC's default in responding to discovery and notice for trial. A true copy of the Order of Dismissal is annexed as Exhibit "8".

64. By reason of the intentional wrongs committed by GSC and other persons and entities acting in concert with GSC against Trefalcon without legal excuse and which deprived it of a substantial and profitable business, Trefalcon was unable to meet its obligations, driven out of business, forced to seek relief under the Bankruptcy Act, and damaged irreparably in name and reputation, for which misconduct the Defendants GHANA and GSC are responsible and should be held liable for all consequential damages which, exclusive of interest, upon information and belief are believed to be in excess of thirty-five million ($35,000,000.00) dollars.

65. By reason of the intentional wrongs committed by GSC and other persons and entities acting in concert with GSC against Trefalcon without legal excuse and which deprived it of a substantial and profitable business, Trefalcon was unable to meet its obligations, driven out of business, forced to seek relief under the Bankruptcy Act, and damaged irreparably in name and reputation, for which misconduct the Defendants are responsible and should be held to respond in punitive damages of not less than fifty million ($50,000,000.00) dollars for which Plaintiff prays judgment against the Defendants.

WHEREFORE, Plaintiff demands judgment against the Defendants:

Upon the First Cause of Action in the sum of $4,089,102.05 with interest from June 1, 1975;

Upon the Second Cause of Action in the sum of $5,279,574.46 with interest from July 1, 1975;

Upon the Third Cause of Action in a sum of not less than $26,000,000.00 with interest from July 1, 1975;

Upon the Fourth Cause of Action in the sum of $4,089,102.05 with interest from June 1, 1975;

Upon the Fifth Cause of Action in the sum of $5,279,574.46 with interest from July 1, 1975; and

Upon the Sixth Cause of Action in the sum of $35,000,000.00 as and for consequential damages, and punitive damages in the sum of $50,000,000.00;

Together with an award of such costs, disbursements and counsel fees as many be allowed by law.

Dated: New York, New York

April 15, 1987

Yours, etc.

JOHN W. FINLEY, JR.
Attorney for Plaintiff
Sidney H. Reich, Trustee

95 Madison Avenue
New York, New York 10016
(212) 213-8908

APPENDIX "B"

Extract from MANDAMUS PETITION

" . . .

WHEREFORE, the petitioners respectfully request that this Court issue a writ of mandamus certifying the issue raised on appeal to the District Court, arising from the bankruptcy adversary proceeding, regarding the statute of limitations bar to the plaintiff's claims; that such issue be determined by an interlocutory appeal under the facts and circumstances of this case; and for such other and further relief as the Court may deem just and proper.

DATED: New York, New York

May 22, 1989

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